STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2003
v	No. 238199 Wayne Circuit Court
MARVIN WALKER, Defendant-Appellant.	LC No. 01-001839

Before: Griffin, P.J., and Neff and Gage, JJ.

MEMORANDUM.

Defendant appeals as of right his jury conviction for second-degree home invasion, MCL 750.110a(3). We affirm.

Defendant asserts that the trial court abused its discretion in denying his request for an instruction on the lesser included misdemeanor offense of entering without permission, MCL 750.115. Breaking and entering without permission is a necessarily included lesser offense of breaking and entering with intent to commit larceny. *People v Cornell*, 466 Mich 335, 360; 646 NW2d 127 (2002). Where there is evidence to support a finding that defendant lacked the intent to commit larceny, the trial court errs in refusing to give the requested lesser offense instruction. *Id.* at 361. There is a similar relationship of elements in the instant offenses: entering without permission is a lesser included offense of second-degree home invasion.

Harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses. *Id.* A preserved, nonconstitutional error is not a ground for reversal unless it is more probable than not that the error was outcome determinative. *Id.* at 363-364. The reliability of the verdict is undermined when substantial evidence supports the lesser included offense instruction. *Id.* at 365.

In the present case, the instructional error, if any, was harmless because the evidence did not clearly support a conviction on the lesser offense of entering without permission. Defendant's testimony established that he believed that he had permission to enter the house.[1]

[1] In denying defendant's request for an instruction on the lesser offense, the trial court ruled:

> [T]he requested misdemeanor must be supported by a rational view of the evidence at the trial. . . . in this particular case the defendant indicated that he

(continued…)

There was strong evidence to support his conviction on the charged offense. The officer testified he found defendant hiding behind a couch. Tin snips, two screwdrivers, and a pair of scissors were in his back pocket. The alarm keypad was torn off the wall. The TV and VCR were bundled up and had been moved. Officer Samuel Choice was working with Officer Firsdon, and his testimony was consistent with his partner's testimony.

Next, contrary to defendant's argument, we conclude there was sufficient evidence to support defendant's conviction. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). MCL 750.110a(1)(a) defines a dwelling as a structure or shelter that is used permanently or temporarily as a place of abode. Breaking and entering an occupied dwelling was the predecessor offense to home invasion. MCL 750.110. The home invasion statute now refers to a dwelling, rather than an occupied dwelling. A house may be used as a place of abode, even though it is not presently occupied.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Hilda R. Gage

(…continued)

went in because he thought he had the permission of the owner and [sic] not a circumstance in which he entered the residence without permission. So since there does not seem to be any evidence offered by either the prosecution or the defendant to indicate that the defendant was entering without, simply entering without permission, I'm going to deny the misdemeanor request in this case.